CF0000062830

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR (M. P)

CRIMINAL APPEAL NO. 1010 OF 1999

Division Bench (Crl.)

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE

APPELLANTS (IN JAIL) :1. Jhumuklal son of Gopal Sahu aged about 45 years, Agriculturist

2. Mansukh son of Jhumuklal Sahu aged about 21 years, Agriculturist

3. Ram Sheela daughter of Jhumuklal Sahu aged about 18 years, Agriculturist

4. Smt. Ram Kali wife of Jhumuklal Sahu aged about 42 years, Agriculturist

All residents of village Bajrangpur, Navagaon, P.S. Rajnandgaon, dist. Rajnandgaon (MP).

(4873)

Filed on 8/4/99 by Shri S.L. Verma Advocate

Rlo. A.R.

VERSUS

RESPONDENT ; The State of M.P. through P.S. Rajnandgaon (MP)

HIGH COURT OF CHHATTISGARH : BILASPUR

(Division Bench)

CORAM: Hon'ble Shri Vijay Kumar Shrivastava &
Hon'ble Shri Dhirendra Mishra, JJ.

CRIMINAL APPEAL NO.1010 of 1999

Appellants : Jhumuklal and others

Vs.

Respondent: The State of Chhattisgarh

PRESENT:

Shri CR Sahu, Advocate with Shri Prakash Tiwari, counsel for the appellants.

Shri DK Gwalre, Deputy Govt. Advocate for the State/respondent.

J U D G M E N T

(6th May 2006)

Per Hon'ble Shri Dhirendra Mishra, J.

The appellants have preferred this appeal under Section 374 (2) of the Cr.P.C. as the learned Additional Sessions Judge Rajnandgaon vide his judgment dated 06.03.1999 passed in Sessions trial No.130/97 convicted appellants No.1, 2 & 3 under Section 302/34 of the IPC and appellant No.4 under Section 302 read with Section 109 and 120-B of the IPC and sentenced appellants No.1,2 & 3 to undergo imprisonment for life and to pay fine of Rs.1,000/- each and in default of payment of fine, additional RI for two months. Appellant No.4 has been sentenced to Imprisonment for life and fine of Rs.1,000/- in default of payment of fine additional R.I. for two months.

2) Case of the prosecution is that Latikabai (PW-1) gave information in the Police Station Rajnandgaon on 25.07.1997 between 11 am to 12 noon to the effect that Devantinbai of her village, who was seen hale and healthy on 24.07.1997, has died; her daughter Ramkali and son-in-law Jhumuklal are preparing to cremate her dead body in haste. The villagers who have seen the dead body of Devantinbai stated that blood was oozing from the nose and mouth of the deceased and there was a property related dispute between Devantinbai, her daughter Ramkali and son-in-law Jhumuklal. Death of Devantinbai was suspicious and on the basis of this report, merg was registered. SHO of the concerned police station proceeded for the scene of occurrence, prepared spot map vide Ex.P/1. The body of Devantinbai was sent for postmortem to the District Hospital Rajnandgaon and Dr S Bakshi (PW-11) conducted postmortem and submitted his report vide Ex.P/26. Crime No.400/1997 was registered on the basis of FIR (Ex.P/27) given by Bharati. During the investigation, plain and blood stained soil from the place of occurrence, blood stained quilt, blood stained sari were taken into possession vide Ex.P/2. The Viscera of Devantinbai in a plastic container, and sample of the liquid in another container, ornaments owned by the deceased were seized vide Ex.P/3. General power of attorney (Ex.P/4) executed by Devantinbai in favour of Appellant No. 1 dated 31.10.1995, Will dated 31.10.1995 (Ex.P/5) in favour of Jumuklal, another Will dated 03.11.1995 (Ex.P/6) by Devantinbai in favour of Jumuklal were taken into possession vide seizure memo Ex.P/14. On the memorandum (Ex.P/7) of Jhumuklal-accused No.1, two blood stained bed sheets were recovered vide seizure memo Ex.P/11. On the memorandum

(Ex.P/8) of Ramsilabai-accused No.3, blood stained sari was taken into possession vide seizure memo Ex.P/13. On the memorandum (Ex.P/9) of Mansukh, a piece of white blood stained cotton cloth was taken into possession vide seizure memo Ex.P/12. Similarly, on the memorandum (Ex.P/10) of Ramkali, tooth of the deceased was taken into possession vide seizure memo Ex.P/15. Nails of both hands of the accused persons Jhumuklal, Mansukh and Ramkali were cut and seized vide Ex.P/16, 17, 18. Blood stained cloths of the accused Mansukh, Jhumuklal were taken into possession vide Ex.P/19 and Ex.P/20 respectively. Tooth of the deceased seized at the instance of Ramkali was sent to the doctor for his opinion and after examination; he opined that the seized tooth is human tooth. Blood stained articles were sent to the Regional Forensic Science Laboratory, Raipur for chemical examination vide Ex.P/28. Crime detail was prepared on 25.07.1997, detailing the site plan of place of incident. The accused persons were arrested on 26.07.1997 vide Ex.P/41, P/42, P/43 and P/44. Rin Pustika (Ex.-P/45, P/46 & P/47), registered notice and envelops Ex.-P/48 & P/49, Public notification issued by Devantinbai vide Ex.-P/50, Public notification issued by Ram Kali (vide Ex.-P/51) and treatment papers of Purnima Sahu (Ex.-P/53, P/54 & P/55) were taken into possession vide Ex.-P/14. The report of F.S.L. is Ex.-P/56. The samples were again sent to the Serologist for confirmation of origin and report is Ex.-P/57.

3) After completing the investigation, charge sheet under Sections 302 and 201/34 was filed against the appellants in the Court of C.J.M. Rajnandgaon who in turn committed the case to the Court of Sessions Judge,

Rajnandgaon and same is received on transfer by learned Additional Sessions Judge for trial.

4) Charges under Section 302, in the alternative, 302/34 of the I.P.C. and 201/34 of the I.P.C. were framed against the appellants. The appellants abjured their guilt.

5) The prosecution in order to establish the charge against the accused examined 19 witnesses. Thereafter, statements of the accused persons under Section 313 of the Cr.P.C. were recorded in which the accused persons denied the circumstances appearing against them in the prosecution case and pleaded their innocence and false implication and stated that there are two factions in the village and Latika Choubey was used as an instrument in the prosecution. Learned trial Court after hearing counsel for the appellants and Additional Public Prosecutor sentenced the accused persons as mentioned above.

6) The homicidal death of deceased Devantinbai is not in dispute. Even otherwise, PW-11 Dr.S. Bakshi submitted postmortem report vide Ex.-P/26 in which he found injuries over the right side of the neck. He also found cartilage hyoid of trachea broken and blood was clotted between the skull and brain. He opined that cause of death was asphyxia as a result of injury over the head. Thus on the basis of statement of PW-11 and his postmortem report, homicidal nature of death is established.

7) The prosecution in order to establish charges relied upon circumstantial evidence as there is no eyewitness to the incident. The circumstances relied upon by the prosecution are as follows:-

i) There was property dispute between the deceased and the appellants No.1 and 4 namely Jhumuklal and Ramkali. To establish this circumstance, the record of rights pertaining to the property of Devantinbai, according to which, she had 6.19 acres of land in the village has been filed. The Will dated 31-10-95 has also been filed along with a General Power of Attorney executed on the same day by which the deceased appointed accused No.1 Jhumuklal as her power of attorney and she also willed the property in favour of Jhumuklal on the same date. Another Will dated 03-11-95 has been filed to show that there was dispute between the deceased and the appellants No.1 & 4. Thereafter, she again executed a Will (Ex.-P/6). A public notification in the local newspaper purportedly issued by the deceased on 26-3-97 revoking the power of attorney in favour of Jhumuklal and another public notification published in the newspaper on 19-6-97 by Ramkali claiming that her mother has lost her mental balance and thereafter, no-one should enter into any transaction with her mother in respect of her property. From the above documents, a circumstance is established that there was property related dispute between the deceased and the appellants.

ii) Second circumstance relied upon by the prosecution is that on the date i.e. 25-7-97 PW-1 Latika Choubey gave intimation in the Police Station informing about the suspicious death of the deceased and mentioning in the said information that the appellants are trying to cremate the dead body of the deceased in a haste.

iii) Third circumstance is that on the date i.e. 25-7-97 itself the dead body of the deceased was found. In the evening the accused/appellants No.1

and 4 went together to the house of PW-1 Latika Choubey and confessed their guilt detailing the circumstances of the conspiracy and the manner in which they executed the crime in question.

iv) Another circumstance to implicate accused No.1 in the offence in question is that on the basis of his memorandum two blood stained bed sheets were seized vide Ex.-P/11. On the memorandum of accused No.2 Mansukh blood stained piece of white cotton cloth was seized vide Ex.P/12. From accused Ramsheela, blood stained sari was seized vide Ex.P/13 and from accused Ramkali a broken tooth of the deceased was recovered. The witness of the seizure memo is PW-8 Noharlal Sahu. He has proved the memorandums of Ex.-P/8 of Ramsheela, Ex.-P/9 of Mansukhlal, Ex.-P/10 of Ramkali, and Ex.-P/11 of Jhumuklal. In pursuance of the said memorandums and on the basis of the above memorandums articles were seized vide seizure memos Ex.-P/11, P/12, P/13 and P/14. He has also proved the seizure of nails which were cut from both the hands of appellants Jhumuklal, his daughter Ramsheela and his son Mansukh which were taken into possession vide Ex.-P/16, P/17 and P/18. As per the report of F.S.L., articles collected are nails of Jhumuklal, shirt seized from Mansukh and two bed sheets seized from Jhumukhlal containing blood. According to the Serologist's report, 17, 18 and 20, shirt seized from Mansukh and two bed sheets seized from Jhumukhlal contained human blood. However, according to the report of Serologist, the origin/blood group could not be confirmed because the samples were not sufficient for test.

v) The last circumstance relied upon by the prosecution is that according to the postmortem report, the deceased died homicidal death by

strangulation which corresponds to the extra judicial confession made by the appellants No.1 and 4.

8) Learned counsel for the appellants argued that extra judicial confession made by appellants No.1 and 4 before Latika Choubey (PW-1) cannot be acted upon because the same is unnatural and the manner in which the confession alleged is made, is most improbable. It is argued from the evidence available on record that it would be evident that in fact Latika Choubey (PW-1) was used as an instrument in prosecution to show the involvement of appellants in the aforesaid crime. There is evidence to this fact that the village is fraction ridden. Roshni (PW-3) in para-5 of her statement stated that there were two factions in her village, in which Latika Choubey is one side whereas Raja Ram etc., are on the other side. Present accused persons are of Raja Ram party while Gayatribai (PW-2), Anarbai (PW-6) etc., are in the party of Latika Choubey. It is however, argued that the alleged confession has not been reproduced by the witness in words in which it was made before her and the same is cryptic and from going through the statement of Latika Choubey (PW-1) it is not clear as to which accused person made what confession. Therefore, no finding of the confession can be recorded on the basis of statement of Latika Choubey. It is further submitted that so far as the seizure of blood stained articles from the possession of the appellants Jhumuklal and Mansukh is concerned, though presence of human blood on the articles has been mentioned in the report of Serologist, but in the absence of evidence that the blood present on the articles corresponded to blood group of the deceased conviction cannot be

sustained only on the basis of these recoveries. Relying on the judgment in the matter of ***Dhananjaya Reddy Vs State of Karnataka reported in AIR 2001 SC 1512*** counsel argued that in the absence of any substantive evidence against the accused persons, only on the basis of extra judicial confession allegedly made by appellants No.1 & 4 conviction cannot be based. Further relying on the judgment in the matter of ***Naresh Mandal & another Vs State of Bihar reported in 2006(2) Crimes 131 High Court*** it is argued that the appellants cannot be convicted solely on the circumstances that there was a dispute between them in relation to the property owned by the deceased, in the absence of any other incriminating evidence or in the absence of any eyewitness of the incident.

9) On the other hand, learned counsel for the State supporting the judgment of the trial Court argued that there was a strong circumstance which has been duly established by the prosecution in terms of motive, extra judicial confession and recovery of the blood stained articles. Each circumstance has been established and the cumulative effect of the circumstance establishes the guilt of the appellants, so far as the argument that appellant No.4 has been convicted with the aid of Section 120-B/109 of the IPC without framing specific charge in this regard is concerned, simply because charges have not been framed under Section 120-B read with Section 109 IPC, conviction cannot be set aside. Bare perusal of the charge shows that the ingredients of the conspiracy are very much there but the defence was not able to demonstrate as to what prejudice was caused to appellant No.4 in any way. Reliance is placed in the matter of ***Kammari Brahmaiah and***

others Vs Public Prosecutor, High court of AP reported in *AIR 1999 Supreme court 775* to demonstrate where the omission to frame charge was there, no prejudice is caused to the accused; the same does not affect the confession. Further placing reliance in the matter of *Government of NCT of Delhi Vs Jaspal Singh* reported in *2004 SCC (Cri) 933 (para 9)*, it is argued that as per principles under Section 30 of the Indian Evidence Act, where the Court is inclined to accept the other evidence available on record against the accused, but not prepared to act upon such evidence alone, in such circumstances the confession of a co-accused can be pressed into service to fortify its belief to act on it also. Further placing reliance in the matter of *State of Maharashtra Vs Damu Gopinath Shinde and others* reported in *AIR 2000 SC 1691*, it is argued that the extra judicial confession by one of the accused persons implicating referring to what other accused have said and done in reference to common intention of conspiration can be used under Section 10 of the Evidence Act against those accused persons as well in the same manner in which it is usable against the confessor himself.

10) We have heard learned counsel for the parties.

11) So far as the first circumstance of motive is concerned, from the documentary evidence available on record as also from the evidence of Latika Choubey (PW-1), it is clear that there was a dispute between the deceased and appellants No.1 & 4. This dispute relates to the property recorded in the name of the deceased Devantinbai. However, the question to be considered in this appeal is whether the prosecution has been able to establish any other circumstance in the form of substantive evidence to establish the involvement of the appellants in the crime in question. If we

look into the evidence and material available on record, the prosecution has tried to establish the charge on the basis of statement of Latika Choubey (PW-1), who is witness of extra judicial confession by appellants No.1 & 4 and the recovery of blood stained articles on the memorandum of the appellants. However, the evidence of Latika Choubey (PW-1) does not inspire confidence of this Court for the following reasons:-

From the evidence available on record, particularly from the statement of Roshni (PW-3), we find that the village is divided into two factions; one headed by Latika Choubey (PW-1) and the other by Raja Ram (PW-4). The accused persons belong to Raja Ram party whereas this witness Roshni (PW-3) and Gayatribai, Anarbai, Purnima, Deepkunwar, Subhau, Kanhaiyyalal and others belong to the party of Latika Choubey. Kanhaiyyalal (PW-5) has also admitted that there is a dispute in the village. Therefore, contention of Latika Choubey (PW-1) that accused No.1 & 4 went to her house in the evening on the date when she telephoned to the Police Station appears to be un-natural. Even otherwise, the account of extra judicial confession also appears to be un-convincing inasmuch as it contained the minute details of the conspiracy hatched by the appellants and subsequent conduct after the incident. The confession of the accused appellants No. 1 and 4 is also not referred in their own words and the whole confession has been illustrated by this witness as if she was eyewitness to the incident. If we consider this account in the back ground of the overall statement of this witness and also in the light of the fact that this witness and the accused persons belong to two rival factions of the village, we are of the opinion that it would not be safe to

act on the statement of this witness. The statement of Ex.D-1 was recorded on 26th July 1997, though the police has arrived in the village on 25.07.1997 and the alleged confession was made in the evening of the same date. The statement of other witness was also recorded on 25.07.1997. There is no explanation as to why the statement of Ex.D-1 was recorded on 26th July.

12) So far as recovery of blood stained articles from the custody of appellants Jhumuklal and Mansukh is concerned, evidence of Noharlal Sahu (PW-8) proved all those documents vide their memorandum. He is resident of village Gordha and he stated that on 26th July 1997 he had gone to Police Out Post Chowk - Chickly; there he saw all those appellants for the first time and did not know their names. There, they were being interrogated by the police. In the cross examination, he was not able to state the colour of the clothing worn by the appellants. He further stated that all the documents were prepared collectively after interrogation.

13) In the aforesaid circumstances, it would not be safe to rely upon the statement of this witness for the purposes of memorandum and seizure from the accused persons. Even otherwise, in the absence of evidence that the articles seized from the appellants contained the same blood group as that of the deceased Devantinbai, the conviction of the appellants cannot be based solely on the ground of seizure of blood stained clothing from the appellants.

14) So far as the argument of counsel for the State, on the basis of judgment of ***Kammari Brahmaiah (supra)*** is concerned, it is true that if prejudice not caused to the appellants for non-framing of the charge; the

same does not affect the conviction. But in the instant case, as it is held in the foregoing paras, that extra judicial confession is not reliable and there is no evidence of conspiracy except the statement of this witness and therefore the conviction of appellant No.4 with the aid of Section 120-B read with Section 109 of the Cr.P.C cannot be sustained.

15) So far as the judgment in the matter of ***Government of NCT*** (Supra) is concerned, it is also not applicable in the facts of the instant case as we have already held that the prosecution has not been able to establish extra judicial confession by appellants No.1 & 4 by adducing reliable evidence. In the matter of ***State of Maharashtra*** (supra), the confession of accused of that case was recorded under Section 164 of the Cr.P.C., by the Judicial Magistrate First Class, who was examined as prosecution witness and who in the Court, stated that before recording the statement he has ensured that the confession was voluntary. However, in the instant case, as per the reasons mentioned above, we are not able to rely upon the version of Latika Choubey (PW-1) and therefore, the above judgment is not applicable in the facts of the instant case.

16) On the basis of aforesaid discussions, we are of the considered opinion that prosecution has not been able to establish the involvement of the appellants in the crime in question on the basis of circumstantial evidence and the circumstances relied upon by the prosecution have not been independently proved by reliable & cogent evidence. In the aforesaid circumstances, the Court below was not justified in holding the appellants guilty and convicting them by the impugned judgment.

17) In the result, the appeal preferred by the appellants is allowed. The judgment of learned Additional Sessions Judge is set aside and the appellants are acquitted of all the charges as they are entitled for benefit of doubt. Appellant No.1 - Jhumuklal who is in jail, is directed to be set at liberty forthwith, if he is not required in any other case and appellants No.2 to 4 (appellant No.2 - Mansukh, No.3 - Ram Sheela, No.4 - Ramkali) who are on bail, need not surrender and their bail bonds are discharged.

Sd/-
V.K.Shrivastava
Judge

Sd/-
DHIRENDRA MISHRA
Judge

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